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**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF WYOMING**

| | | |
|-----------------------------|---|-------------------|
| In re: |) | |
| |) | |
| WESTERN BIOMASS ENERGY LLC, |) | Case No. 12-21085 |
| |) | Chapter 11 |
| Debtor. |) | |
| |) | |
| |) | |

**MOTION TO CONVERT CASE TO CHAPTER 7 OR, IN THE ALTERNATIVE,
MOTION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE**

The Official Unsecured Creditors' Committee ("Committee"), through its counsel, moves for conversion to chapter 7 or, in the alternative, appointment of a chapter 11 Trustee. To support this motion, the Committee states:

BACKGROUND

1. Western Biomass Energy, LLC ("Debtor") filed this Chapter 11 proceeding on October 31, 2012 (the "Petition Date").
2. Blue Sugars Corporation ("Blue Sugars") is an entity that owns 64% of the Debtor. Blue Sugars was formerly known as KL Process Design Group LLC and KL Energy Corporation. The Debtor alleges that Blue Sugars is its parent company.

3. The Debtor's manager is Thomas J. Bolan. Mr. Bolan is also an officer of Blue Sugars. The Debtor's only other officer, Peter Gross, is also an officer of Blue Sugars. The Debtor and Blue Sugars share the same principal address in South Dakota.

4. Blue Sugars and the Debtor are not truly separate operations; Blue Sugars is the only source of funding for the Debtor's operations, and revenues generated by the Debtor are paid to Blue Sugars.

5. On December 6, 2012, at the 11 U.S.C. § 341 hearing, Mr. Bolan testified that he filed an amended security agreement on behalf of Blue Sugars, and against the Debtor, 6 days before the Petition Date. Mr. Bolan testified that Blue Sugars gave the Debtor "cash" to receive the security interest, but could not recall the dollar amount.

6. Blue Sugars' secured claim is in the amount of \$1,942,778.33, and has an unsecured claim for \$29,902,534.86. *See* Dkt. # 43.

7. During the month preceding the Petition Date, the Debtor sold pieces of equipment, including an extruder and hydroblaster. On information and belief, the proceeds from these sales were given to Blue Sugars.

8. The equipment sold pre-petition was subject to a secured lien held by Security National Bank of Omaha (the "Bank"). The Bank was not notified of the sale of its collateral and did not receive proceeds from the sale.

9. The Debtor has no operating revenue, no business, and no income. *See* Monthly Operating Report ("MOR"), Dkt. # 30 (November), Dkt. # 63 (December).

10. Blue Sugars provided the Debtor with post-petition financing in the amount of \$50,000.00 in November and \$23,000.00 in December. *See* Dkt. Nos. 30, 63.

11. The post-petition financing was outside of the ordinary course of Debtor's business and was provided without Court approval.

12. The Debtor used the unauthorized \$50,000.00 post-petition loan from Blue Sugars to report a positive cash flow of \$12,057.00 for the month of November. *See* MOR, Dkt. # 30. The Debtor's actual cash flow was negative in the amount of \$37,943.00. *Id.*

13. Again without Court authority or notice to the trustee or other creditors, Blue Sugars provided a second post-petition loan of \$23,000.00. *See* MOR, Dkt. # 63. Using these funds as cash receipts, the Debtor reported negative cash flow in the amount of \$14,656.00 for the month of December.

PENDING MOTIONS FILED IN THIS CASE

14. On December 7, 2012, the Debtor moved for authority to receive \$250,000.00 in post-petition financing from Blue Sugars. *See* Debtor's Motion, Dkt. # 20. The Debtor has offered Blue Sugars a superpriority lien against all of its property for the loan. Debtor's motion is set for hearing on February 22, 2013.

15. Blue Sugars (through its former name KL Energy Corporation) entered into an agreement with Petróleo Brasileiro S.A. or Petrobras, the fifth largest energy company in the world ("Petrobras"), to "partially retrofit" the Debtor's plant. *See* Debtor's Motion, Dkt. # 20, ¶ 6. For this project, the Debtor contracted with its creditors to perform construction work and provided other goods and services.

16. The contract with Petrobras provides Blue Sugars with revenue. The principals of Blue Sugars and the Debtor structured operations such that debt was incurred by the Debtor, but revenue was not received by the Debtor. The Debtor thereafter failed to fulfill its obligations to pay its creditors, creating unsecured debt in this case.

17. Blue Sugars executed purchase orders issued by the Debtor to its creditors on the Petrobas project. When payment was made, Blue Sugars paid for the good and services provided to the Debtor.

18. The Debtor has moved to sell equipment under 11 U.S.C. § 363(b) to a third party. *See* Dkt # 25. The Debtor intends pay the Bank and continue to pay its employees and other operating expenses with the sale proceeds.

19. The Debtor has moved to sell ethanol under 11 U.S.C. § 363(b) to a third party. *See* Dkt. # 65. The Debtor intends to pay its employees and other operating expenses with the sale proceeds.

20. In light of the pre- and post-petition actions of the Debtor and Blue Sugars, the Committee seeks authority to conduct examinations and request the production of documents under FedR.Bankr.P. 2004. *See* Dkt. # 64. Debtor objects to authorizing the Committee to conduct examinations. *See* Dkt. # 67.

ARGUMENT AND AUTHORITY

A. Debtor's Lack of Operations, Revenue, Income and Inability to Rehabilitate, Coupled with Conflicts of Interest, Make Conversion of this Case Appropriate.

21. The Court shall convert a chapter 11 case to a chapter 7 case, absent unusual circumstances that establish that the requested conversion is not in the best interest of the creditors and the estate, if the movant establishes cause. 11 U.S.C. § 1112(b)(1); *In re Thorbarsin Ranch, LLC*, 2011 WL 4498806 *2 (Bankr. D. Wyo. 2011). “Cause” to convert a case includes “substantial or continuing loss to or diminution of the estate and the absence of reasonable likelihood of rehabilitation.” 11 U.S.C. § 1112(b)(4)(A).

22. The “loss and diminution” factor considers whether the debtor continues to experience a negative cash flow. *In re Wahlie*, 417 B.R. 8, 11 (Bankr. N.D. Ohio 2009). It also

concerns depreciation of assets that has diminished the estate. *Id.* Conversion is appropriate if the debtor experiences negative cash flow after the petition date. *Loop Corp. v. United States Trustee*, 379 F.3d 511, 515-16 (8th Cir. 2004); *In re Fall*, 405 B.R. 863, 867 (Bankr. N.D. Ohio 2009).

23. Here, the Debtor has suffered and continues to experience a negative cash flow. Specifically, the Debtor has experienced a negative cash flow of \$37,943.00 per month. *See* MORs, Dkt Nos. 30, 63. The Debtor covers its negative cash flow through post-petition loans, which were provided by Blue Sugars without Court approval. The continued accrual of administrative expenses, including professional fees, is also diminishing the estate. Moreover, after incurring post-petition debt by disregarding the “notice and hearing” requirement in 11 U.S.C. §§ 364(c) and (d), the Debtor seeks further detriment by granting a superpriority lien to Blue Sugars, *nunc pro tunc*. *See* Dkt. # 20.

24. The ongoing detriment to the estate is clear. Instead of seeking Court approval for post-petition loans, the overlapping control by the same individual(s) allowed Blue Sugars to electronically transfer funds into the Debtor’s post-petition DIP bank account. *See* MOR, Dkt. # 63, pp. 18-20. The Debtor is diminishing the estate by incurring additional debt, abusing its unilateral power, and breaching its fiduciary duty. If converted, a chapter 7 trustee will preserve value and expeditiously liquidate the estate assets for the benefit of the creditors.

25. The second portion of § 1112(b)(4)(A) requires a reasonable likelihood of rehabilitation. The reasonable likelihood of “rehabilitation” standard in § 1112(b)(4)(A) is a much more demanding standard than “reorganization.” *In re Brutsche*, 476 B.R. 298, 301 (Bankr. D. N.M. 2012). “Rehabilitation is not another word for reorganization. Rehabilitation means to reestablish a business. Whereas confirmation of plan could include a liquidation plan,

rehabilitation does not include liquidation.” *Id.* at 302 (citing 7 *Collier on Bankruptcy* ¶ 1112.04[6][a][ii] (Alan N. Resnick and Henry J. Sommer eds., 16th ed. (footnotes omitted))). The standard is whether the debtor’s business prospects justify continuance of the reorganization effort. *Id.* at 301.

26. The Debtor is liquidating and therefore has no likelihood of rehabilitation. *See Loop Corp.*, 379 F.3d at 515. The Debtor does not operate as a going concern.

27. The Debtor has no income, no business, and no prospect of obtaining these. The “existence of an ongoing business is an inherent requirement for relief under chapter 11.” *In re Blue Mountain Invs., Inc.*, No 90-4175S, 1991 WL 49710 at *3 (D. Kan. 1991). The Debtor has had no customers or source of funding other than Blue Sugars (and its predecessors). *See* Debtor’s Motion, Dkt. # 20, p. 2, ¶ 4-5. Mr. Bolan testified at the § 341 hearing that the Debtor’s only business is to provide services to Blue Sugars, its majority owner.

28. The Debtor’s decision to take loans from Blue Sugars absent notice or hearing demonstrates the lack of rehabilitation. Providing a superpriority claim to Blue Sugars, after being the only source of funds for the Debtor, forecasts Blue Sugars’ knowledge (and implicitly, the Debtor’s knowledge) that the Debtor cannot repay its loan, much less rehabilitate or reorganize. The unilateral action in receiving \$73,000.00 from Blue Sugars and requesting authority to grant a superpriority lien *nunc pro tunc* shows the Debtor’s interest in protecting Blue Sugars, not its estate or creditors.

29. The best interests of the estate are served by conversion and eliminating the apparent conflict of interests surrounding the Debtor and Blue Sugars. The Debtor sold equipment subject to the Bank’s secured lien without notifying the Bank. The Debtor failed to provide requested documents showing the location of these sale proceeds, promoting the

Committee's belief that the proceeds went to Blue Sugars. The Debtor also granted Blue Sugars an amended security interest for approximately \$2 million a few days before filing this case.

30. The Committee believes it is necessary to investigate these circumstances through Rule 2004 examinations. Yet, the Debtor objects to this request as premature and challenges the relevance of the examinations. *See* Debtor's Objection, Dkt. # 67. Debtor's objection is disingenuous given its knowledge of the pre- and post-petition actions. It also shows that an independent party should be in control of the estate and claims that may be asserted against third parties. These claims include but are not limited to avoidance of Blue Sugars' security interest and the potential to recharacterize part or all of Blue Sugars' claim against the estate.

31. It is not in the best interest of the creditors and the estate to allow Debtor's Chapter 11 case to continue. Doing so only delays the inevitable conversion to a chapter 7 while depriving creditors the proceeds from liquidation of the estate assets. The Debtor only needs to liquidate assets; it has no operations to rehabilitate or reorganize.

32. Accordingly, this case should be converted under 11 U.S.C. § 1112(b)(4)(A). An independent chapter 7 trustee should review the Debtor's pre-petition transactions and identify claims against insiders or third parties. A trustee can equally preserve and sell the Debtor's assets, and conversion will alleviate the ongoing detriment to creditors and serve the best interests of the estate.

B. The Debtor Cannot Act in the Best Interests of the Estate Since Blue Sugars is the Alter Ego of the Debtor. If Conversion is Not Granted, the Court Should Appoint a Chapter 11 Trustee.

33. This Court may order appointment of a chapter 11 trustee if it is in the interest of the estate and its creditors. 11 U.S.C. § 1104(a). Factors a court considers in appointing a chapter 11 trustee include the overall management of the debtor, both past and present; the trustworthiness of the debtor's management; the nature of and availability of financial records;

the movement of funds between the debtor and related entities; the ability of management to act as a fiduciary for the estate; and pragmatic considerations such as cost. *In re Rivermeadows Assoc., Ltd.*, 185 B.R. 615, 617 (Bankr. D. Wyo. 1995).

34. “Deep-seeded conflict and animosity between a debtor and its creditors provides a basis for the appointment of a trustee.” *Petit v. New England Mort. Servs.*, 182 B.R. 64, 70 (D. Me. 1995); *See also In re Colorado-Ute Elec. Assoc., Inc.* 120 B.R. 164, 175-76 (Bankr. D. Colo. 1990) (finding cause to appoint trustee when the court could not “envision a way for the current management and board to resolve the inherent conflict between what is best for Colorado-Ute, its creditors, and the co-op members.”)

35. The Committee believes Blue Sugars is the alter ego of the Debtor. The companies have overlapping managers and, in at least one circumstance, the Debtor incurred liability on a project in which revenue received from the project were or will be sent directly to Blue Sugars. These liabilities created Debtor’s unsecured claims. The Debtor and its managers abused corporate formalities to insulate Blue Sugars from liability. These pre-petition actions must be investigated and pursued. The Debtor’s conflict is irreconcilable. Its management cannot act as a fiduciary for the estate.

36. Moreover, the Debtor sold equipment otherwise available to creditors, and Blue Sugars apparently received the proceeds. The Debtor took post-petition financing without Court authority, is attempting to preclude the Committee’s investigation of potential wrongdoing and causes of action, and has filed motions seeking to sell estate property to benefit its own members at the expense of the estate. Under these facts, the Debtor’s current management cannot continue.

37. An appointment of a chapter 11 trustee will preserve the integrity of the bankruptcy process and insure that the interest of creditors are served. *See In re Embrace Systems Corp.*, 178 B.R. 112, 128 (Bankr. W. D. Mich. 1995) (appointing a trustee when the debtor's president was more concerned about a non-debtor's future business than the success of the debtor's chapter 11 case). An impartial trustee will ensure estate assets are being preserve with reasonable cost and effectiveness. The assets can be liquidated efficiently providing benefit to the creditors, and the trustee can analyze and pursue appropriate causes of action held by the estate.

38. Importantly, the Committee requests appointment of chapter 11 trustee in the alternative, since the inability of the Debtor to reorganize should preclude additional chapter 11 administrative expenses.

Dated this 12th day of February, 2013.

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CERTIFICATE OF SERVICE

I, Brandon Blessing, do hereby certify that on February 12, 2013, copies of the foregoing **MOTION TO CONVERT CASE TO CHAPTER 7 OR, IN THE ALTERNATIVE, MOTION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE** were served by electronic mail and/or by placing the same in the U.S. Mail, postage prepaid, to the parties on the attached lists:

/s/ Brandon Blessing
Brandon Blessing

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12-21085
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Label Matrix for local noticing

1089-2

Case 12-21085

District of Wyoming

Cheyenne

Tue Feb 12 08:20:27 MST 2013

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53005 Bonn
www.frings.com

(d)Internal Revenue Service
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End of Label Matrix
Mailable recipients 117
Bypassed recipients 7
Total 124